

NOTICE REGARDING CONTINUATION OF PROCEEDING/HEARING SCHEDULED FOR
JANUARY 18, 2022

Applicant – The Peach Pit, LLC
101 East River Road: Block 47; Lot 1
Rumson, New Jersey

The matter involves an Application of The Peach Pit, LLC for a Use Variance, several “C” Bulk Variances, and Preliminary and Final Site Plan Approvals for the Applicant to use the existing two story commercial building (formerly used as a real estate brokerage office) into a facility with the first floor being a youth recreation area/café with food service and the second floor being a tutoring/student learning center. The facility would also be used, when not in use by young students, as an occasional small party meeting room for limited groups or for adult continuing education classes or testing. The property (Block 47 Lot 1) is in the General Business (GB) Zone, which permits professional office, business office, a number of retail uses, and a number of personal services uses, all as enumerated in §22-5.11 of the Borough Development Regulations. The proposed new use is not among the permitted uses; thus a Use Variance is required along with the several Bulk Variances.

The Hearing on the Application commenced on June 15, 2021 before the Zoning Board of Adjustment, and continued at the Board meeting on July 20th, September 21st, October 19th and December 14th, 2021. There were a number of interested parties who appeared and participated, both in favor or opposed to the proposal. Expert witnesses by both sides presented testimony to the Zoning Board. All the Hearing sessions, including the December 14th session, were conducted virtually, by Zoom.

The December 14, 2021 session was scheduled for 7:00 p.m. and commenced at approximately 7:30 p.m. Present and participating - - - each having attended or having certified as listening to the tape of all previous sessions - - - were Chairman Brodsky, Vice Chairman Torcivia, regular members Shissas, Carras, Blum, Hofferber, alternate #1 McGill, and alternate #2 Izzo.

The Municipal Land Use Law (MLUL) (N.J.S.A. 40:55D-1 et seq.) establishes the processes and procedures governing the Zoning Board and Applications before the Board. Under N.J.S.A. 40:55D-69, the Zoning Board is authorized to have up to seven (7) regular members (the Board presently has six (6) regular members and one (1) vacancy), along with alternate members (presently alternate #1 and alternate

#2). Alternate members participate in the Hearings, but only vote in the absence or vacancy of a regular member. As noted in N.J.S.A. 40:55D-69, in the event it is appropriate for an alternate to vote; the "alternate members shall vote in the order of their numerical designation." In this case that involves a "Use Variance", the Application to be approved requires "an affirmative vote of at least five members" of the Zoning Board. In such cases, it is customary that the vote be taken by a full seven (7) member Board with an alternate to participate in the event of a regular member absence or vacancy. Thus, as per the MLUL with six (6) participating and qualified regular members, alternate #1 if qualified was statutorily the alternate to vote to make-up the full authorized 7 member Board for the vote.

As noted, the December 14th continued Hearing began with 6 Board members and alternate #1 and alternate #2 present. Testimony of a planner presented by an objector, testimony by the owner of 101 East River Road, and then comments/testimony by approximately 20 interested members of the public were presented, concluding at about 10:25 p.m. The original intent and Board policy, announced at the beginning of the session, was to adjourn the proceeding, if not completed, by 10:30 p.m. At the point of the testimony concluding at about 10:25 p.m., there was a brief discussion and the Board consensus was to continue the proceeding for a limited further time to possibly finalize a determination. A short comfort break was called.

The Zoom Hearing reconvened at about 10:35 p.m. At about that time, a Board member roll call was then taken; the Zoom meeting moderator advised and stated that alternate #1 appeared on the Zoom equipment as no longer on the Zoom conference. Alternate #1 had initially called in and commenced attendance by phone connection, and at a later point logged on the meeting by computer. Both devices had been recognized as her by the Zoom moderator.

The assumption, at least to the undersigned, was that for personal reasons or the lateness of the hour, alternate #1 was no longer on the Zoom meeting and had voluntarily exited the proceeding. As alternate #2 was available to make a 7 member Board and the lateness of the hour appeared to preclude a delay to make inquiry or attempt to contact alternate #1 to verify her absence, no such effort was made and the Hearing continued.

After brief summations by the objector attorneys and the Applicant attorney, the Hearing was then closed (at about 11:00 p.m.) and the Board commenced deliberations and internal discussion. As determined by subsequent inquiry, at that point the Zoom moderator placed all persons on the Zoom proceeding, other than Board members and the Board attorney, on "mute". This is the procedure to preclude others from unilaterally unmuting themselves and commenting upon or interfering in the Board deliberations. Other attendees then cannot speak into the Hearing unless that attendee (or more correctly their device) is recognized and "unmuted" by the Zoom moderator. Although at least one or two "attendees" (through their device) attempted several times during the deliberations to unmute themselves and comment during the deliberations, none of those devices were recognized or identified as being the device of alternate #1 and were not "unmuted".

At that point, Chairman Brodsky indicated his own tentative determination as to the Application, and then polled each regular member and alternate #2 (as alternate #1 was deemed no longer present). A motion was then made to approve the Application, seconded, and a roll call vote proceeded with the six regular members and alternate #2 recognized to vote. The vote came out as five (5) affirmative, two (2) negative. The undersigned, as Board attorney, then stated that based on the vote the Application had been approved, subject to adoption of a Resolution at the next scheduled meeting on January 18, 2022. The matter and the proceeding then concluded at about 11:20 p.m.

Alternate #1 thereafter sent an e-mail to Board Chairman Brodsky's e-mail at 11:50 p.m. that same date. That e-mail advised that she had never "left" or exited her device out of the Zoom meeting that night, and for reasons unknown to her, had been unable to "unmute" herself and to speak to make her a continued presence and intent to participate known. The e-mail further advised that she had been prepared to vote and her tentative voting position. The e-mail did not request any further action or a re-vote.

Upon learning of those facts on December 15, 2021, I concluded that further inquiry was required. That inquiry concluded that alternate #1 did not "leave" or exit the Zoom meeting, and remained witnessing the Zoom proceeding, and intended and qualified to vote. The December 14th Zoom

proceeding had as “attendees” an average of approximately 50 to 60 individuals identifiable by their “device” identity name (as to computers sometimes an e-mail address, sometimes a name, sometimes a code name or number; as to a phone usually part of the phone number). Attendees are able, and do, enter or leave the proceeding at any point. The moderator identifies the devices of Board members or others entitled to speak at will and their devices are “unmuted”. Other devices are “muted” by the moderator, until recognized by the Chair and “unmuted” and then that individual can be heard by the Board and others on the Zoom call.

At about the point in time the Board closed the Hearing and entered deliberations, the moderator muted all attendees other than the devices’ identified as of the Board members and Board attorney. For reasons not definitively determinable, the devices of alternate #1 were no longer recognized by the moderator on his screen as in attendance. Alternate #1 has certified her computer remained on, and she continued in attendance and able to witness and hear the proceedings. Apparently, when the moderator “muted” all the non-Board attendees devices as deliberations commenced, alternate #1’s device was also “muted.” At that point, alternate #1 was not aware that her device was “muted” and that, unlike other Board members, could not be heard. As previously noted, in the deliberation the Board Chairman first presented his own tentative position and then called each individual Board member, starting with the regular members, for their tentative position/comments. After each regular Board member was called and commented, being of the belief that alternate #1 was no longer in the Zoom proceedings the Chairman called on alternate #2. At that point alternate #1 attempted to “unmute” herself and speak to advise of her continued presence. Apparently because of her device not showing up on the screen or not being recognized in the muting of attendees other than the recognized Board members/staff devices, she was unable to do so. After alternate #2 stated his tentative position, a motion to approve was made and approved by a 5 to 2 vote with alternate #2 participating.

Those circumstances clearly raise issue as to the validity of the 5 to 2 vote. Alternate #1 was present and participated in the four earlier Hearings (about 12 hours), was recognized as present on December 14, 2021 through the break at about 10:30 p.m., and thereafter mistakenly deemed off the

Zoom meeting because of some technical error or oversight. However, alternate #1 witnessed and heard the entire proceeding. Alternate #1 was precluded from breaking in and correcting the perception error as her device was “muted”. The failure of not briefly investigating and/or confirming alternate #1’s reported “absence” was a result of the late hour and the resulting desire to get to a conclusion if possible that night. The bottom line is that alternate #1 was “present” and witnessed the entire 5 session Hearing, was qualified and statutorily specified as the alternate to vote, and was unable to vote and did not due to a technical Zoom error and the non-confirmation due to the late hour.

This is obviously a very unusual circumstance arising out of the use of Zoom technology, because of the Covid pandemic. Research has uncovered no Court decision arising from such similar Zoom circumstances. As noted, a vote to approve was taken and passed 5 affirmative 2 negative, and normally the next step is for the Board to memorialize that vote at the next Board meeting. However, here the described circumstances call into question the validity of the vote. Legal research on the issue indicates that the Courts have ruled that an administrative body acting in a quasi-judicial proceeding - - - such as this Board in this development Application - - - possesses the inherent power to reconsider and re-vote on a matter, particularly in the situation creating a question as to the validity or fairness of the earlier vote, so long as the Board retains control of the proceeding and rights have not been vested by a final definitive order or decision. As no final Resolution has been adopted, this Board retains control of the proceeding and has the discretionary power to reopen the proceeding and have a re-vote.

As the matter is contested with attorneys on both sides, this conclusion as to the right, and even necessity, to reopen the proceeding and re-vote (by the six (6) regular members and alternate #1) is supported by the analysis in Cox & Koenig, New Jersey Zoning and Land Use Administration § 15-1.4 and cases cited there. See also Handlon v. Town of Bellevue, 4 N.J. 99, 106 (1950); Mackler v. Board of Education, Camden, 16 N.J. 362, 369 (1954). In Schmidhuster v. Planning Board, 408 N.J. Super 1 (App Div 2008), the Planning Board approved a development Application with a vote by a member not eligible (because of not having read the transcripts of a missed meeting). The Law Court and the Appellate Court both found that the appropriate action in the event of a vote of questionable validity was for the Board to

reconvene the proceedings, and deliberate and re-vote, after the defect is cured by the members who missed meetings reviewing the transcripts. That analysis was followed in a similar situation in Price v. Liberty Park at Union City, Docket No. A0032-17 (App. Ct. 2019) (unreported). Perhaps most relevant is the Appellate Court ruling in Lambert v. Beach Haven Land Use Board, Docket A0555-19 (App Div 2020) (unreported). There the Land Use Board voted on a Site Plan Application for a major development in a redevelopment plan area. The vote was 4 in favor, 4 no and 1 abstention, resulting in a “denial”. Before the Board memorialized that denial in a written Resolution, the Applicant submitted a letter requesting the Board “reconsider” its vote for various legal reasons. At the next meeting, the Board voted to allow that reconsideration by a 5 to 4 vote. The Board then re-deliberated and re-voted, with the Site Plan now being approved by a 5 to 4 vote. A Resolution memorializing the approval of the Site Plan was thereafter adopted at the next meeting.

Suit was thereafter filed by the objectors. The Law Court and the Appellate Court both held that:

It was within the discretion of the Board, on its own motion, and before the vote was memorialized in a formal Resolution, to exercise its discretion to have another vote on the Application. The Court further elaborated that it was within the quasi-judicial discretion of the Board, and unless tainted by fraud mistake or other illicit motive, is a valid exercise of the Board’s discretion.

The Courts further held that the Board had the authority to reopen and reconsider the vote; “the only limitations are the considerations and reasonableness, fairness and good cause.” The reopening and reconsideration was found to suspend the requirement under N.J.S.A. 40:55D-10(G)(2) to memorialize the earlier vote within 45 days of that vote. The Court further determined that all members present at the earlier proceedings were eligible to vote on the motion for reconsideration, and then re-deliberate and vote again.

The purpose of this Notice is two-fold. The first is - - - in the interest of full disclosure - - - to provide all interested parties and the public a notification and summary of the facts as to the vote and the circumstances of that vote on the Application. The second purpose is to set forth my opinion and recommendation to the Board as to the appropriate course of action. As outlined previously, as alternate

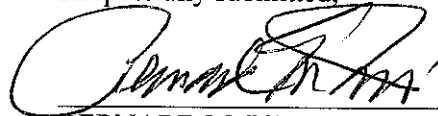
#1 was present for the entire proceeding, the MLUL specifies that alternate #1 was qualified and specified to be the seventh vote for a full Board vote. That alternate #1 was deemed not present and participating was an error, arising from some technical malfunction or error not detected or corrected due to the late hour and the desire to conclude. It is my opinion that the appropriate action is for the Board, on motion and vote, to re-open the deliberation and re-vote with the six regular Board members and alternate #1 participating. In my opinion this motion and possible re-consideration should take place as continuing business from 2021, before the reorganization actions for 2022. Each Board member is not bound by their earlier vote, and is free to comment and vote as each determines. The public comments portion of the Hearing would not be reopened; the motion and re-vote would be part of the continued deliberations. The motion to re-open would require majority (4 of 7 affirmative needed); a re-vote for approval requires 5 affirmative to pass. If there is a motion to approve the Application and that motion fails to obtain 5 affirmative votes, the Courts have determined that the failure to obtain 5 affirmative voters (of the 7 member full Board) constitute a statutory "denial" of the Application. In that circumstance, a further vote to "deny" the Application is not legally necessary, although it is probably prudent for such a motion to deny to be made and it will pass with 3 votes. However, a Resolution must be subsequently prepared by the Board attorney setting forth the reasons and basis supporting the determination. That Resolution of denial would thereafter be voted and adopted by the Board members voting against the motion to approve only. See Kessler v. Bowker, 174 N.J. Super 478 (App. Div.1979) Cox, at §20.3. Whichever way the vote goes, the Resolution to memorialize that determination will thereafter be prepared for adoption at the February meeting.

It is my considered opinion that if the Board does not re-open and re-vote, presumably a lawsuit will be filed challenging the Board approval action on several grounds, including the vote issue outlined above. In my opinion, the first thing the Court would do is remand the matter to the Board for a re-vote as outlined above, even before proceeding into the several substantive legal issues that might be raised. By following the recommended course, the re-vote can be promptly held, the record established without delay and with the same participants. With the facts established, each side (Applicant or objectors), if

they believe this recommendation is in error, can assert and argue in the subsequent Court challenge as to whether the December 14th approval vote counts, or the January 18th re-opening and re-vote counts (if there is a different outcome).

This matter and recommendation can be discussed further by the Board as part of Board deliberations at the January 18, 2022 Board Zoom meeting prior to any action. It is requested that all Board members, including alternates, make a special effort to attend (by Zoom) as an absence would likely complicate an already legally complicated situation. Any interested party who wishes to make legal comment or authority is free to contact me at 732-530-7777.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Bernard M. Reilly", written over a horizontal line.

BERNARD M. REILLY
Rumson Zoning Board Attorney

12/29/2021